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Recent Developments Concerning
Attorneys' Fees in Virginia & Practical Tips

Attorneys' fees are a topic near and dear to lawyers' hearts. After all, what could be more important than getting paid for the work we do? And what could be better than forcing the other party to pay our fees?

In construction cases, as in all litigation, attorneys should keep the prospect of attorneys' fees in mind and should pay close attention to recent developments in the law concerning attorneys' fees in Virginia.

In Virginia, the default rule on attorneys' fees is the American Rule, where each party pays its own attorneys' fees and the winner cannot usually recover its fees from the loser.¹ Nevertheless, attorneys' fees are available to the prevailing party under several statutes in Virginia,² as well as by contractual arrangement between the parties.³

In the construction context, in particular, many contracts contain provisions for an award of attorneys' fees to the prevailing party. Virginia courts generally will uphold these provisions as written.⁴

RECENT DEVELOPMENTS IN VIRGINIA CASE LAW

A. *Lambert v. Sea Oats Condo. Ass'n*, 293 Va. 245 (2017)

In *Lambert*, the Supreme Court of Virginia held that the Circuit Court of Virginia Beach abused its discretion by artificially limiting the amount of attorneys' fees awarded to less than the amount of damages recovered by the plaintiff. In the Circuit Court, Ms. Lambert sought and was awarded \$500 in her suit against a condo association. She then sought more than \$9,500 in attorneys' fees. The judge stated that he felt obliged to limit the award of attorneys' fees because the amount in controversy was so low, and only awarded \$375 in attorneys' fees.

Ms. Lambert appealed to the Supreme Court, which noted that courts are allowed to consider the

results obtained in a case, and may compare this amount to the amount of damages sought, in order to measure the effectiveness of the attorney's representation.⁵ But the court ruled that courts may not use the amount of damages sought or recovered as a limit on the amount of attorneys' fees awarded.⁶ The Supreme Court remanded for an award of reasonable attorneys' fees to Ms. Lambert.

TAKEAWAY: The amount of damages recovered is not an automatic limit on the amount of attorneys' fees that may be awarded, even when the attorneys' fees sought are more than 19 times the amount of damages recovered.

B. *Winding Brook Owner's Ass'n v. Thomlyn, LLC*, 96 Va. Cir. 173 (Cir. Ct. 2017)

At closing argument, the plaintiff asked the jury for damages of \$11,610.88, which the jury awarded in full. The plaintiff then asked the court for an award of around \$120,000 in attorneys' fees and costs. The Hanover County Circuit Court held that the amount sought was reasonable, given the complexity of the case and the steps required because of the defendant's actions. The court ultimately awarded \$117,155.81 in attorneys' fees and \$514.55 in costs.

TAKEAWAY: Based on the complexity and length of a case, courts may award attorneys' fees of more than 10 times the amount of damages recovered.

C. *Graham v. Cmty. Mgmt. Corp.*, 294 Va. 222, 805 S.E.2d 240 (2017)

Ms. Graham was sued by the Community Management Corp. in the Circuit Court of Fairfax County under a contract containing a provision that permitted an award of attorneys' fees to the prevailing party. The Community Management Corp. asked for attorneys' fees in its complaint, but Ms. Graham never asked for attorneys' fees in any of her pleadings, despite having filed

two demurrers, several pleas in bar, and an answer. Ms. Graham ultimately obtained a defense verdict and then filed a suit against the Community Management Corp. seeking to recover the attorneys' fees she incurred in the first suit.

The Supreme Court held that the plain language of Rule 3:25 prevents Ms. Graham from obtaining attorneys' fees because she did not make a demand for them in a counterclaim, cross-claim, or responsive pleading in the first suit.⁷ The court held that Ms. Graham's failure to raise her entitlement to attorneys' fees in one of these pleadings constituted a waiver of her attorneys' fees claim.

The court noted that it is important for both parties to know early on in the case whether attorneys' fees are on the table, because it can affect the parties' decisions on whether to pursue a claim, dismiss it, or settle it.⁸ This notice also keeps parties from having to speculate throughout the case about what claims ultimately might be brought against them.⁹

TAKEAWAY: Prevailing parties will not be able to recover attorneys' fees unless they follow the requirements of Rule 3:25 and ask for attorneys' fees in their pleadings.

D. *McIntosh v. Flint Hill Sch.*, No. CL-2018-1929, 2018 Va. Cir. LEXIS 321 (Cir. Ct. Sep. 17, 2018)

Ms. McIntosh filed a complaint for declaratory relief in the Circuit Court of Fairfax County, seeking to invalidate the one-sided attorneys' fee provision in the Enrollment Contract between her and her child's school. This provision read: "We (I) agree to pay all attorneys' fees and costs incurred by Flint Hill School in any action arising out of or relating to this Enrollment Contract."¹⁰ The court held that this attorneys' fee provision was substantively unconscionable because the provision subjects the parents to

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attorneys' fees, whether they prevailed in litigation against the school or not, and whether the fees sought are reasonable or not.¹¹ The court also found that the attorneys' fee provision was void as against public policy because the award of attorneys' fees contemplated by the provision was not limited to reasonable fees or to a prevailing party, and because the provision significantly barred "potentially meritorious resort to the courts by Plaintiff" and flouted "the corollary principle expressed in the Rules of Professional Conduct not to punish the prevailing party in litigation with payment of the loser's expenses."¹²

TAKEAWAY: A Draconian, one-sided "challenger pays" provision for attorneys' fees likely will not be enforced by Virginia courts.

E. Meuse v. Henry, No. 170604, 2018 Va. LEXIS 132 (Oct. 4, 2018)

This case involved an arbitration in which the defendants prevailed on all counts.¹³ The arbitrators found that the plaintiff's claims lacked reasonable cause and were brought for an improper purpose, and awarded attorneys' fees of \$900,900 and costs of \$8,300 to the defendants. The Circuit Court for

the City of Alexandria confirmed the arbitration award. The Supreme Court upheld the circuit court's confirmation of the arbitration award and summarily upheld the arbitrators' award of attorneys' fees and costs.

TAKEAWAY: Even very large awards of attorneys' fees in arbitration likely will be upheld by courts in Virginia, absent extraordinary circumstances.

PRACTICAL TIPS TO RECOVER AS MUCH OF YOUR FEES AS POSSIBLE

To the extent a party intends to seek attorneys' fees, that party should be attentive to the hours spent and billed, and to how those hours are billed. Claiming attorneys' fees in Virginia starts with the pleading. Rule 3:25 of the Rules of the Supreme Court of Virginia requires that a party seeking to recover attorneys' fees "include a demand therefore in the" complaint, counterclaim, cross-claim, third-party pleading, or in a responsive pleading.¹⁴ The party must also "identify the basis upon which [it] relies in requesting attorney's fees."¹⁵ Failure to demand attorneys' fees constitutes a waiver and is an absolute bar to recovery.¹⁶ Virginia

law further requires pre-judgment notice to the other party on the face of a pleading.¹⁷ Good practices could include emphasizing the demand for attorneys' fees in all caps or bold lettering stating "Rule 3:25 Notice" and then listing the legal basis for the demand.

Claimants also should be mindful that courts in Virginia adhere to the general rule that attorneys' fees must be reasonable and necessary.¹⁸ Virginia courts first will consider the lodestar figure, which is determined by multiplying the number of reasonable hours expended times a reasonable hourly rate, and then subtracting fees spent on unnecessary claims, while considering the overall success of the parties.¹⁹

The reasonable hourly rate is determined by the prevailing market rate where the court sits.²⁰ The most important evidence for proving the reasonable hourly rate is expert testimony, usually by affidavit. The court also will consider the difficulty of the case and the experience of the attorneys.²¹

After determining the reasonableness of an attorneys' fees claim, Virginia courts then consider whether all the fees were necessary. Courts have discretion to deduct unnecessary fees if



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a claim, defense, motion, or attorney action was “frivolous, spurious, or unnecessary.”²² Although attorneys should advocate zealously for their clients, attorneys should be careful not to bill for services that are unnecessary to the client’s litigation.

Virginia courts will discount block billing, travel, vague or redacted billing, double billing, and clerical work.²³ Attorneys should be careful to keep detailed and segregated billing entries that do not contain confidential or privileged information that would later need to be redacted. Attorneys should bill separately for separate causes of action even within the same case. When it comes time to submit the fee petition, attorneys would do well to self-audit their bill for problematic entries.

Attorneys should also keep track of the time and costs spent on their fee petition, because those fees also may be recoverable.²⁴ Attorneys should submit affidavits from themselves and from experts as to the reasonableness and necessity of the hours expended and the hourly rate. Once the petition is filed, attorneys should expect courts to carefully inspect the billing records submitted with the fee petition.

CONCLUSION

Attorneys should always consider the possibility that attorneys’ fees might be available to one or more of the parties in the case. These fees will not be limited by the amount in controversy and, in fact, might dwarf the amount awarded as damages at trial. Considerations of attorneys’ fees should help guide critical decisions on whether to bring a claim, defend it, or settle it. And when attorneys’ fees are sought, the tips in this article will help

attorneys recover as much of their fees as possible. ■

Endnotes

1. *Reineck v. Lemen*, 292 Va. 710, 721 (2016).
2. Examples of statutes in Virginia that provide for an award of attorneys’ fees to a prevailing party include the Virginia Consumer Protection Act, Va. Code Ann. § 59.1-207.14; Virginia’s Business Conspiracy statute, Va. Code Ann. § 18.2-500; Virginia’s Religious Freedom statute, Va. Code Ann. § 57-2.02(D); Virginia’s Freedom of Information Act, Va. Code Ann. § 2.2-3713(D); and Virginia’s Trade Secrets Act, Va. Code Ann. § 59.1-338.1.
3. *See Ulloa v. QSP, Inc.*, 271 Va. 72, 81 (2006) (“parties are free to draft and adopt contractual provisions shifting the responsibility for attorneys’ fees to the losing party in a contract dispute.”). There are a few other areas where courts in Virginia can award attorneys’ fees, as well. *See Carlson v. Wells*, 281 Va. 173, 188-89 (2011) (noting that attorneys’ fees have been awarded in Virginia in a malicious prosecution/false imprisonment matter, where a breach of contract forced the plaintiff to maintain or defend a suit with a third person, where a trustee defended his trust in good faith, in cases involving alimony and support disputes, and in a fraud suit, at the court’s discretion).
4. *See Ulloa*, 271 Va. at 81. Nevertheless, a manifestly one-sided and unconscionable attorneys’ fee provision will be struck down. *See McIntosh v. Flint Hill Sch.*, No. CL-2018-1929, 2018 Va. Cir. LEXIS 321, at *17-25 (Cir. Ct. Sep. 17, 2018).
5. *Lambert*, 293 Va. at 254-56.
6. *Id.* at 257.
7. *See* Va. Sup. Ct. R. 3:25(B) (“Demand. — A party seeking to recover attorney’s fees shall include a demand therefore in the complaint filed pursuant to Rule 3:2, in a counterclaim filed pursuant to Rule 3:9, in a cross-claim filed pursuant to Rule 3:10, in a third-party pleading filed pursuant to Rule 3:13, or in a responsive pleading filed pursuant to Rule 3:8. The demand must identify the basis upon which the party relies in requesting attorney’s fees.”), 3:25(C) (“Waiver. — The failure of a party to file a demand as required by this rule constitutes a waiver by the party of the claim for attorney’s fees, unless leave to file an amended pleading seeking attorney’s fees is granted under Rule 1:8.”).
8. *Graham v. Cmty. Mgmt. Corp.*, 294 Va. 222, 231 (2017) (quoting *Stockman v. Downs*, 573 So. 2d 835, 837 (Fla. 1991)).
9. *Id.*
10. *McIntosh*, 2018 Va. Cir. LEXIS 321 at *3.
11. *Id.* at *21.
12. *Id.* at *23-24.
13. *Meuse v. Henry*, No. 170604, 2018 Va. LEXIS 132, at *17-19 (Oct. 4, 2018).
14. Va. Sup. Ct. R. Rule 3:25.
15. *Id.*
16. *Id.* *See also* *Graham*, 294 Va. at 225-26.
17. Va. Sup. Ct. R. Rule 3:25.
18. *Chawla v. BurgerBusters, Inc.*, 255 Va. 616 (1998).
19. *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 41 Va. Cir. 171, 172-73 (Newport News 1996); *see e.g., RECP IV WG Land Investors, LLC v. Capital One Bank (USA), N.A.*, 93 Va. Cir. 282 (Fairfax Cnty. 2016); *Dewberry & Davis, Inc. v. C3NS, Inc.*, 284 Va. 485 (2012).
20. *Hernandez*, 41 Va. Cir. at 173. *See also RECP IV WG Land Investors, LLC*, 93 Va. Cir. at 321-22. In determining whether the number of hours expended are reasonable, Virginia courts start with the 12 “Johnson” factors adopted by the U.S. Supreme Court. *RECP IV WG Land Investors, LLC*, 93 Va. Cir. at 328. These factors are (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to properly perform the legal service; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and results obtained; (9) the attorney’s experience, reputation, and ability; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Hernandez*, 41 Va. Cir. at 173.
21. *See Hernandez*, 41 Va. Cir. at 173-74.
22. *Dewberry & Davis, Inc.*, 284 Va. at 496.
23. *See RECP IV WG Land Investors, LLC*, 93 Va. Cir. at 329.
24. *Id.* at 339.

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